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Supreme Court of the United States.

No. 170.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

vs.

BARBER ASPHALT PAVING COMPANY, - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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vs.

BARBER ASPHALT PAVING COMPANY, . *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

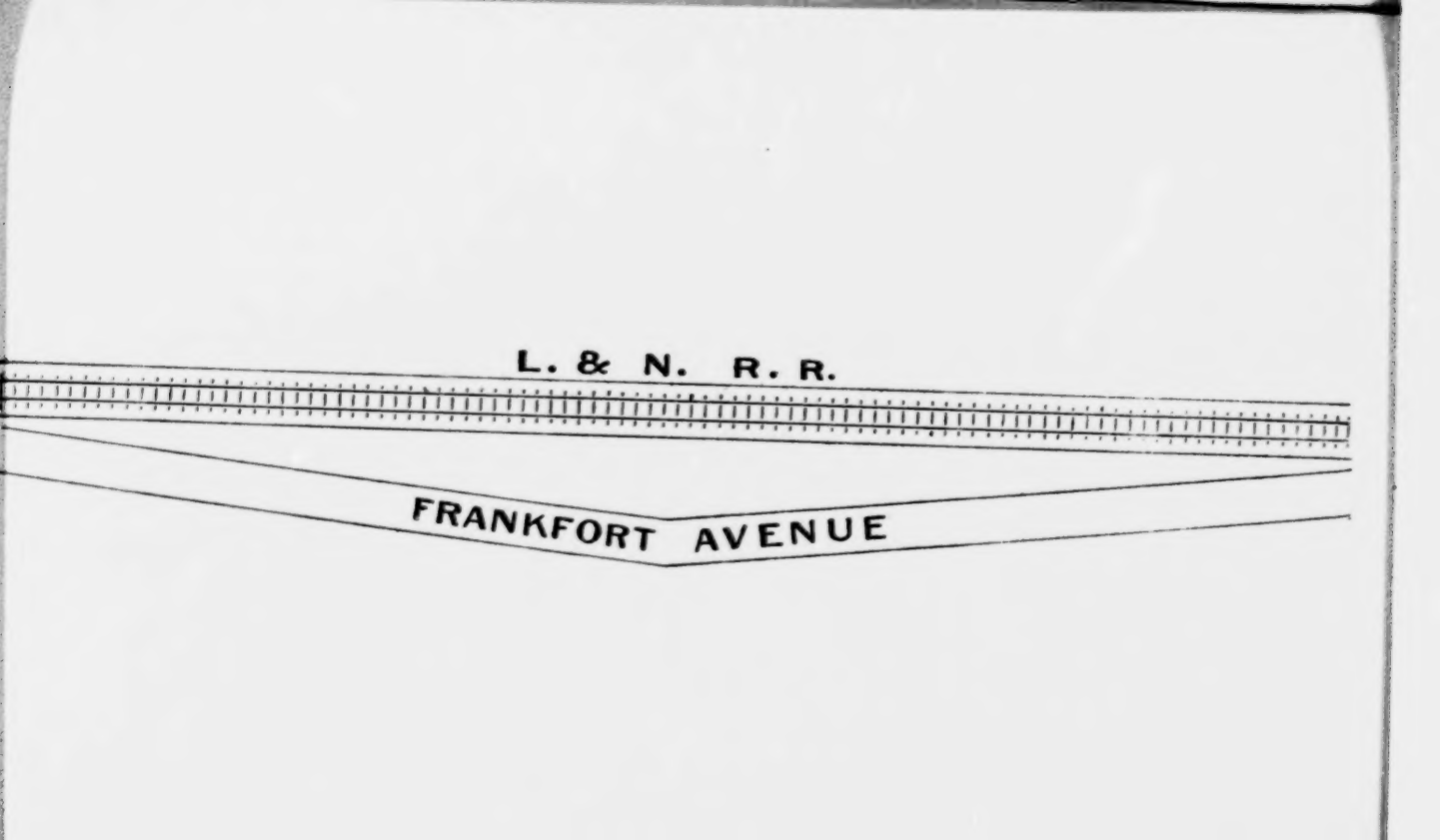
The record in this cause is brought here by a writ of error to the Court of Appeals of Kentucky.

The object of the suit is to subject a section of the *right of way of a railroad* to the payment of a large sum as part of the cost of improving a street which lies practically side by side with the right of way for about one-third of a mile; although it is conceded that the right of way does not, and can not, derive the slightest benefit from the improvement of the street, but that, on the contrary, the existence of the street adjacent to the railroad is a disadvantage rather than an advantage. The railroad company insists that to subject its property to this payment, assessed against it on what is known as the "special assessment plan," is to deprive the company of its property without due process of law, contrary to the provisions of the Federal Constitution.

The railroad of the Louisville & Nashville Railroad Com-

pany through the extreme eastern portion of the city of Louisville lies, for a long distance, side by side with a street called Frankfort Avenue. This was formerly an old turnpike leading from the city of Louisville to Shelbyville and Frankfort and other points east. On account of the growth of the city its boundaries were extended, thus taking in a large amount of land from Jefferson County, and bringing within the limits a long section of the old turnpike. This was then improved as a city street by laying upon it an expensive asphalt pavement. The entire cost of this improvement was apportioned upon the immediately adjacent property on the local assessment plan. This suit embraces one section of the improvement thus made, this section being about one-third of a mile in length. The railroad, as said above, lies practically side by side with the highway in question. At the extreme east and west ends of the section involved in this suit the railroad and the highway are adjacent to each other; but between the two ends the highway deflects somewhat to the southward, so that, near the halfway point, it is about 100 feet from the line of the railroad. In other words, the situation is as shown on the accompanying diagram, it being remembered that the railroad is a double track railroad.

The city of Louisville assessed upon the section of the railroad right of way here involved the sum of $3,472.94 as its part of the cost of making this improvement of the street. The railroad company declined to pay it, for the reason stated in its answer, which we shall presently quote. The contractor, to wit, the Barber Asphalt Paving Company, to which had been issued the city's warrant against the right of way, brought suit in the Jefferson Circuit Court, asserting a lien upon the right of way for $3,472.94, with interest, and asked for a sale to satisfy the same. The defendant answered, and as that answer is not unduly long, and states


L. & N. R. R.
FRANKFORT AVENUE

the facts upon which the decision of the case rests, we here quote it in full:

"Defendant, the Louisville & Nashville Railroad Com-
"pany, denies that it is, or at the institution of this action
"was, the owner of a lot of land described in the petition
"as belonging to it, or to any part thereof, except in the
"manner and to the extent hereinafter set forth.

"Par. 2. Said defendant says it is a corporation
"created for the purpose of owning and operating a rail-
"road under and by an act of the General Assembly of
"Kentucky, entitled 'An Act to charter the Louisville &
"Nashville Railroad Company,' approved March 5, 1850,
"and various acts amendatory thereof.

"It says it does now own and for many years has owned
"a line of railroad extending from Newport, Ky., to and
"through Louisville, Ky., and thence southwardly through
"Kentucky and other States.

"It owns, and has long owned, a perpetual right of way
"for railroad purposes from Newport to and into Louis-
"ville, over a long strip of land, which is about 110 miles
"long and about 66 feet wide, on which is constructed its
"roadbed, and over which are operated its trains between
"and into the cities aforesaid. Occasionally, for short
"distances, the width of the right of way as above given
"varies, but that given above is the usual width, and is
"its greatest width at the place referred to in the petition
"herein. The said right of way passes over the parcel of
"land described in the petition herein as belonging to this
"defendant; in other words, it constitutes a section of
"said indivisible and continuous right of way beween the
"cities aforesaid; and the only interest of defendant in
"said land is an easement therein, to wit, the perpetual

"right of itself, its successors and assigns, to the use of "the same for railroad purposes, as aforesaid; and should "such use be abandoned, all interest of this defendant, its "successors and assigns, in said land would cease. Over "said parcel of land, which, as aforesaid, is, at its greatest "width, only 66 feet wide, is constructed a section of "defendant's roadbed between its terminal properties in "the cities aforesaid, and on the same are laid two tracks, "parallel with the northerly and southerly lines of said "parcel of land described in the petition, constituting what "is called a double track, and being parts of defendant's "two main tracks between the cities aforesaid, over which "are operated its trains between said cities. *On said par-* "*cel of land there are no houses or buildings, but it is used* "*only, and is available for use only, as an indivisible part* "*of defendant's right of way aforesaid, on which is located* "*a section of its roadbed as aforesaid, and over which its* "*trains pass between its terminal properties in the two* "*cities aforesaid.*

"Said parcel of land over which said right of way "exists, as aforesaid, runs practically parallel with the sec- "tion of the street described in the petition herein as hav- "ing been improved. The south line of said parcel of land, "over which the said right of way exists, and the north "line of the said street are very close together, possibly in "contact with each other, at the extreme eastern and "western ends thereof, and, while the south line of the said "right of way is a straight line, the north line of the "street is a curved line, the concave side thereof being "toward the line of said right of way; the greatest "distance between said two lines being about 105 feet, "which is at a point about halfway between the eastern "and western ends of the property and street described in "the petition.

"*Defendant says neither said parcel of land described* "*in the petition, nor any right or interest of defendant* "*therein, is, or has been, or will be, or can be, benefited to* "*the slightest degree by the improvement of Frankfort* "*Avenue as set forth in the petition herein. On the con-* "*trary, the existence of said avenue and the improvement* "*thereof, which will lead probably to an increase in the use* "*thereof, being very close to the said right of way of* "*defendant, is a positive injury to defendant and its said* "*right of way, rather than a benefit.* Said right of way "could be more safely and advantageously used by defend- "ant for the only purpose for which it does or can ever "use it, if said Frankfort Avenue were entirely removed "from within the territory described in plaintiff's petition "as a tax district, than it can with said avenue in said "district.

"Defendant says that to subject said parcel of land "described in the petition, or defendant's interest therein, "under the ordinance referred to in the petition, to the "payment of any part of the cost of the improvement of "Frankfort Avenue, or to compel this defendant in any "way to pay any part of the cost of improving said "Frankfort Avenue, otherwise than by means of a general "tax laid equally and uniformly upon all taxable property "in the city of Louisville, *will be to deprive this defend-* "*ant of its property without due process of law, and* "*would deny to it the equal protection of the laws, con-* "*trary to the provisions of the Fourteenth Amendment to* "*the Constitution of the United States.*

"Wherefore, defendant prays that plaintiff's petition "be dismissed." (Rec. 16.)

In other words, the defendant in effect pleaded, as a matter of fact, that the exaction here sought to be made from it

for the cost of this public improvement was in "substantial excess of the special benefits accruing to it"; that the cost assessed against it was $3,472.94, whereas there was no special benefit whatever accruing to its property sought to be charged; and that this was, therefore, "a taking, under the guise of taxation, of private property for public use without compensation."

To this answer the plaintiff demurred; that demurrer was sustained; and after making a correction in the assessment, whereby it was reduced by the sum of $296.22, the court entered a judgment giving plaintiff a lien upon this section of the right of way for sums aggregating $3,176.72, and ordered a sale to satisfy the same. (Rec., 50.) From that judgment an appeal was taken to the Court of Appeals of Kentucky, where it was affirmed; and the case was then brought to this court by writ of error.

The improvement of the street was made under a statute of Kentucky, passed July 1, 1893, being an act for the government of cities of the first class in the State, in which class the city of Louisville falls. The provisions of this statute are found in the compilation officially termed "Kentucky Statutes." Those sections of the statute which, so far as we know, are supposed to have any bearing on the present case, are given in full in an appendix to this brief, the sections being numbered as they are numbered in the Kentucky Statutes, running from Section 2832 to Section 2839, both inclusive.

This statute in substance provides that "when the improvement is the original construction of any street, * * * such improvement shall be made at the exclusive cost of the owners of lands in each fourth of a square, to be *equally* apportioned by the Board of Public Works *according to the number of feet* owned by them respectively."

It then defines a "square" as follows, to wit: 'Each

subdivision of the territory bounded on all sides by principal streets shall be deemed a square." But of course it was manifest to the framers of the statute that a street might be built or improved through a section of the city where streets have not been regularly laid out, so as to define it into squares. And accordingly the statute provides that: "When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the *depth* on both sides fronting said improvement, to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance."

Thus it will be seen that, where the property contiguous to the improvement in question has been defined into squares, the statute fixes an inflexible rule for *all cases*, under which rule the property lying on each side of the street improved, and extending halfway back to the next parallel street, is assessed for the cost of the improvement; the assessment being laid on every lot of land included within these limits "equally * * * according to the number of feet" in them respectively. The statute does not use the expression "halfway back to the next parallel street," but it says, the improvement shall be made "at the exclusive cost of the owners of lands in *each fourth of a square*." And this has always been considered to mean that, where the contiguous territory is defined into squares by principal streets, the assessment on each side must extend halfway back to the next parallel street, thus including two quarter squares on each side of the street improved. This rule is inflexibly followed, even when the distance to the next parallel street on one side is greater than the distance to the next parallel street on the other side of the street improved. (Cooper vs. Nevin, 90 Ky. 89, 92.)

But when the contiguous territory is not defined into squares by streets, then it is manifest that the rule of going halfway back to the next parallel street could not possibly be followed, because there is no parallel street. It was necessary therefore to prescribe a rule for such a case; and accordingly the statute provides, as we have seen, that the City Council, in passing the ordinance for the improvement in such a case, shall define "the *depth* on both sides fronting said improvement to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively within the depth, as set out in the ordinance."

It will be observed that where the property is defined into squares the council, in passing the ordinance, is given no discretion whatever as to the property upon which the assessment is to be laid, or as to how much shall be assessed upon one lot and how much upon another. The statute itself fixes the rule, to wit, that the assessment shall extend back halfway to the next parallel street, and that all property within that territory shall be assessed equally according to the number of square feet in each lot embraced therein. Speaking of that section of the statute, or rather of a section in exactly the same language in a pre-existing statute, the Court of Appeals of Kentucky said:

> "Under this provision of the charter, where the prop-
> "erty is bounded on all sides by principal streets, or the
> "territory is laid off into squares, there is no difficulty in
> "making the assessment; the charter in such a case has
> "provided the manner in which the assessment shall be
> "made, and every foot of land within the fourth of a square
> "must contribute to pay for the improvement. The City
> "Council orders the improvement, and *the law* provides the
> "mode of assessment and *the property to be assessed.*"
> (Loeser vs. Redd, 14 Bush, 20.)

So, when the property adjacent to the street improved is *not* defined into squares by principal streets, the only discretion which the council has is in fixing "*the depth*" to which the assessment shall extend on each side of the street; in other words, how far back a parallel line shall be drawn between which and the improvement all the property must be equally assessed according to the number of square feet therein. Even in this case the council has absolutely no right to consider differences of situation as between the various pieces of property within the defined territory. It only has the discretion of saying how far back from the improvement the outer boundary line of the district to be assessed shall be laid; this being necessary because the rule which prevails under the statute when the property is divided into squares can not prevail when it is not defined into squares.

But the district to be assessed having been fixed by the statute itself, where the property is defined into squares, or having been fixed by the council by merely locating the outer boundary line, when the property is not defined into squares, no discretion or judgment whatever is allowed to the council as to the amount of burden to be imposed upon any particular part of the property included within this boundary. All property thus included must, under the mandate of the statute, be assessed "equally," according to the number of square feet owned by each owner of property therein. No consideration whatever is allowed of the character of the improvement, or the nature, or situation, or value of any particular lot within the prescribed territory. The outer boundaries of the territory upon which the burden is to be laid are ascertained, the cost of the improvement is ascertained, all other considerations are rejected, and the same cost is laid upon each square foot within that territory by a mathematical calculation; although there may be some property within the

territory which, on account of its peculiar character, or situation, or on account of the peculiar character of the street, receives absolutely no benefit from the making of the street, but, on the contrary, may be injured by it.

It is true, the statute contains the following provision:

> "No error in the proceedings of the General Council "shall exempt from payment, after the work has been done "as required by either the ordinance or contract; but the "General Council, or the courts in which suits may be "pending, shall make all corrections, rules and orders to do "justice to all parties concerned." (Sec. 2834.)

But while this gives to the council and to the court the right to correct errors, it does not give to either the right to enter upon the consideration of the question as to whether any particular piece of property is or is not benefited by the improvement for which the charge is made. And so the Court of Appeals has construed the law. It is not necessary to go beyond the case at bar to discover this. For in the answer of defendant it pleaded in unambiguous terms that its right of way herein sought to be charged was not benefited to the slightest extent by the improvement in question, but that the improvement was an injury rather than a benefit; and these allegations were admitted to be true, and yet were held by the court to constitute no defense.

The Circuit Court said: "The question of benefits is determined *by the legislature*, and can not be raised as is attempted to be done in this case by the Louisville & Nashville Railroad Company in the second paragraph of its answer." (R. 28.)

And the Court of Appeals, in affirming the judgment, said, quoting from one of its opinions in a former case: "Necessarily individual cases of hardship will arise, but it

(the Kentucky system) approaches an equality as nearly as it is practicable. It follows that the lot owner may be compelled to pay his proportion of the cost of an improvement, *although in his particular case his property may not be benefited.* This rule, however, can not be so extended as to *entirely* take from the citizen his property. This would work 'a manifest injustice.' It would be spoliation, and not taxation. *Under the guise of benefit and taxation he can not be thus arbitrarily deprived of his property.* It would be an appropriation of it by the exercise of an arbitrary power to public use without compensation." (R. 69.)

In other words, if the citizen owns property worth $5,000, and an improvement is made which is of *no benefit* at all to the property, and the cost of which assessed against this lot is $2,500, this, being only *half* the value of the property, will therefore take only *half of the property* to pay it; and, according to the view of the Court of Appeals of Kentucky, this would be a constitutional assessment, and the court could give no relief. If, however, the cost of the improvement assessed against this property is $5,000, this *equals* the value of the property, and will take the *whole property* to pay it; the citizen's property will, therefore, be "entirely" taken from him. This, says the court, would be "spoliation and not taxation." It would, "under the guise of benefit and taxation," be "but an appropriation of it, by the exercise of an arbitrary power, to public use without compensation." In the opinion of the Court of Appeals it is unlawful to take *everything* the citizen has without compensation, but entirely lawful to take *half of it* without compensation.

Thus we have presented this state of case: The legislature, in 1893, seven years before the improvement now in question was made, adopted a *general rule*, without any regard whatever to individual cases or conditions, that when-

ever a street should be improved through a section of territory which had been defined into squares by streets running through it, the cost of the improvement should be assessed against the adjacent territory halfway back to the next parallel street. This was not the decision of questions arising out of a past condition, but it was the enunciation of a rule for future conduct. And it was not a mere general rule of *prima facie* application; but a universal, immutable rule. And the highest court of the State has held that, under it, the citizen's property, though not benefited at all by a given improvement, may be taken to pay for the same, provided only that the whole property be not taken.

Under this statute the General Council of the City of Louisville passed an ordinance on June 6, 1900, as follows, to wit:

"Be it ordained by the General Council of the City of "Louisville:

"That the carriage way of Frankfort Avenue, from the "center line of Cavewood Avenue, extended, to the center "line of Raymond Avenue, extended, shall be forty (40) "feet in width, and shall be improved by grading, curbing "and paving with the asphalt pavement. Said work shall "be done in accordance with the plans and specifications "on file in the office of the Board of Public Works, and at "the cost of owners of ground on the northerly side of "Frankfort Avenue, from the center line of Clifton Avenue "and Clifton Avenue extended, to the center line of Ewing "Avenue and Ewing Avenue extended, *and extending back "to a depth of 195 feet;* and on the southerly side of "Frankfort Avenue, from the center line of Raymond Ave-"nue and Raymond Avenue extended, *and extending back "to a depth of 195 feet.*

"The cost to be *equally apportioned* among the owners "of property *according to the number of square feet* of

"ground owned by the parties respectively within the "limits above set out, and that all ordinances in conflict "herewith be and are hereby repealed." (R. 9.)

It will be observed that this ordinance attempts to prescribe the *depth* of territory to which the assessment shall extend, to wit, 195 feet on each side of the street improved. This was on the theory that the territory adjacent to Frankfort Avenue was not defined into squares; and the petition in the case at bar alleges such to be the fact. (R. 3.) But the court subsequently held that the territory was defined into squares, and that the statutory rule must apply of going halfway back to the next street. (R. 33.) This took in a little more territory, and therefore reduced slightly the assessment per square foot.

A section of the right of way of the Louisville & Nashville Railroad was embraced under either mode of designating the territory to be taxed. Under the mode attempted to be adopted by the council, the assessment against the right of way of the Louisville & Nashville Railroad Company was $3,472.94. Under the mode adopted by the court, this assessment was reduced by the sum of $296.22, and was fixed at sums aggregating $3,176.72. (R. 50.)

In the suit to enforce this assessment the company answered, as we have seen, that this right of way was not, and could not possibly be, benefited to the slightest extent by the improvement in question, and that it could not be constitutionally taken to pay for it. The defendant did not allege, and could not truthfully allege, that the assessment was *equal* to the value of the property, and that it would "entirely" take the property to pay it; but the petition showed that the assessment was for $3,472.94, and the answer stated that the property, to wit, this right of way, was not benefited to any

extent by the improvement, but, on the contrary, was impaired in value by it, thus showing certainly an assessment "in substantial excess of the special benefits accruing to it." *And these facts were admitted.* Yet the court, using the language heretofore quoted, held in effect, that, because the property was not "entirely" taken, no relief could be given, and ordered the property sold to pay the assessment. Was that right? That is the question.

ASSIGNMENT OF ERRORS.

The plaintiff in error complains that the court erred in holding that by this proceeding there could be exacted from it, as the owner of the right of way in question, a substantial sum as the cost of a public improvement, when it was admitted, and is a fact, that *no benefit whatever* accrued to the property thus assessed from the improvement for which the assessment was made. In other words, plaintiff in error complains that—

> "the exaction from (it) the owner of private property of
> "the cost of a public improvement in substantial excess
> "of the special benefits accruing to him is, to the extent
> "of such excess, a taking, under the guise of taxation, of
> "private property for public use without compensation."

ARGUMENT.

I.

Constitutional Basis of Special Assessments.

So far as we are aware, it has been universally held that the only constitutional basis for taxation by special assessments upon selected property, as distinguished from general taxation, is *special benefits* to the property assessed accruing from the improvement for which the assessment is made.

Judge Dillon in his work on Municipal Corporations, summarizing the law on this subject, says:

> "Special benefits to the property assessed, that is, bene-
> "fits received by it in addition to those received by the
> "community at large, is the true and only just foundation
> "upon which local assessments can rest." (2 Dillon, Mun. Corp. §761, Subsec. 3.)

In Barnes vs. Dyer, 56 Vt. 469, 471, the court said:

> "The act in question made no express allusion to
> "assessment on account of benefit; neither does it limit
> "the assessment to the amount of benefit. Yet, as we
> "have seen, the right to assess at all depends solely on
> "benefit, and must be apportioned to and limited by it."

In McCormack vs. Patchin, 56 Mo. 33, 36, the court said:

> "The whole theory of local taxation or assessments is
> "that the improvements for which they are levied afford
> "a remuneration in the way of benefits. The law which
> "would attempt to make one person, or a given number
> "of persons, under the guise of local assessments, pay a
> "general revenue for the public at large, would not be an
> "exercise of the taxing power, but an act of confiscation."

In the State vs. Mayor of Newark, 37 N. J. Law, 415, the court, through Chief Justice Beasley, said:

"In a government in which the legislative power is not "omnipotent, and in which it is a fundamental axiom "that private property can not be taken without just "compensation, the existence of an *unlimited right* in the "lawmaking power to *concentrate the burden* of a tax "upon specified property *does not exist.* If the statute "should direct a certain street in a city to be paved, and "the expense of such paving to be assessed on the houses "standing at the four corners of such street, this would "not be an act of taxation, and it is presumed that no "one would assert it to be such. If this can not be "maintained, then it follows that it is conceded that the "legislative power in question is not *completely arbitrary.* "It has its limit; and the only inquiry is, where that "limit is to be placed.

"This question was considered, and, as it was supposed, "was definitely settled by this court in the case of the "Tidewater Co. vs. Coster, reported in 3 C. E. Green, 519. "The principle sanctioned by that decision was that the "cost of a public improvement might be imposed on *par-* "*ticularized property* to the extent to which such prop- "erty was *exceptionally benefited;* and that any *special* "*burthen beyond that measure was illegal.* It was upon "this principle that the case was rested. The rule thus "adopted stands upon the idea that it establishes a "standard by which, with at least an approach to pre- "cision, an act of taxation may be distinguished from an "act of confiscation." (p. 421.)

In Hammett vs. Philadelphia, 65 Pa. St. 146, 153, the court, speaking through Judge Sharswood, said:

"If the sovereign breaks open the strong box of an

"individual or corporation and takes out money, or, if not "being paid on demand, he seizes and sells the lands or "goods of the subject, it looks to me very much like a "direct taking of private property for public use. It "certainly can not alter the case to call it taxation. When- "ever a local assessment upon an individual is not "*grounded upon and measured by the extent of his partic-* "*ular benefit*, it is *pro tanto, a taking of his private* "*property for public use without any provision for compen-* "*sation.*"

In King vs. Portland, 38 Oregon, 402, 63 Pacific, 1, the judgment in which was afterward affirmed by this court (184 U. S. 61), the court, after referring to the principle upon which general taxation rests, then said:

"Local or special assessments for local benefits stand "upon a different basis. They are made and sustained "upon the assumption that a prescribed portion of the "community is to be especially benefited in the enhance- "ment of the value of the property peculiarly situated, "as regards the proposed expenditure of the funds to be "raised by the assessment. It is but a demand of simple "justice that special contributions in consideration of "special benefits, should be made by those receiving the "benefits, but such contributions *ought not*, by the same "demand of justice, *to be enforced in any case beyond the* "*benefits received.*" (p. 418.)

Even the Court of Appeals of Kentucky admits that the only *constitutional basis* for special assessments is special benefits. In the case of Preston vs. Roberts, 12 Bush, 587, the court said:

"All municipal assessments are based on the ground "that the property subjected to assessment is benefited by

"the improvement for which the assessment is made, and "neither the legislature of the State nor of the municipal- "ity can constitutionally subject property not actually or "presumptively benefited by an improvement to assess- "ment to pay the cost of such improvement." (p. 587.)

Finally the matter came before this court in a case which has probably been as widely discussed as any one decided by this court in recent years, to wit, Norwood vs. Baker, 172 U. S. 269; and in that case this court discussed the entire question of the nature, the foundation, and the limitations of the power of taxation in the form of special assessments, and it therein stated the law in the following unmistakable language, to wit:

"Undoubtedly abutting owners may be subjected to "special assessments to meet the expenses of opening "public highways in front of their property—such assess- "ments, according to well established principles, resting "upon the ground that special burdens may be imposed "for special or peculiar benefits accruing from public "improvements. * * * But the power of the legis- "lature in this matter is not unlimited. There is a point "beyond which the legislative department, even when "exerting the power of taxation, may not go consistently "with the citizen's right of property. As already indi- "cated, the principle underlying special assessments to "meet the cost of public improvements is that the prop- "erty upon which they are imposed is peculiarly "benefited, and therefore the owners do not, in fact, pay "anything in excess of what they received by reason of "such improvements. But the guarantees for the "protection of private property would be seriously

"impaired if it were established as a rule of constitutional "law that the imposition by the legislature upon particu- "lar private property of the entire cost of a public "improvement, irrespective of any peculiar benefits "accruing to the owner from such improvement, could "not be questioned by him in the courts of the country. "It is one thing for the legislature to prescribe it as a "*general* rule that property abutting on a street opened "by the public shall be deemed to have been specially "benefited by such improvement, and therefore should "specially contribute to the cost incurred by the public. "It is quite a different thing to lay it down as an *abso-* "*lute* rule that such property, whether it is in fact "benefited or not by the opening of the street, may be "assessed by the front foot for a fixed sum representing "the whole cost of the improvement, and without any "right in the property owner to show when an assess- "ment of that kind is made, or is about to be made, that "the sum so fixed is in excess of the benefits received.

"In our judgment the exaction from the owner of pri- "vate property of the cost of a public improvement in "substantial excess of the benefits accruing to him is, *to* "*the extent of such excess*, a taking, under the guise of "taxation, of private property for public use without "compensation. We say 'substantial excess,' because "exact equality of taxation is not always attainable, and "for that reason the excess of cost over special benefits, "unless it be of a material character, ought to be regarded "by a court of equity when its aid is invoked to restrain "the enforcement of a special assessment." (pp. 278, 279.)

The principle as to the constitutional basis of this character of taxation is here stated so plainly that there can be

no controversy over its meaning. It is true that three of the members of this court dissented ; but a majority concurred, and the law as thus established became the law of the land. How different is this principle from that applied to the case at bar. This court, in Norwood vs. Baker, said that it was unlawful to impose upon the property of the citizen a special assessment "in substantial excess" of the benefits conferred. But the Court of Appeals of Kentucky has said in the case at bar that an assessment may be imposed which *is in substantial excess* of the benefit conferred, provided only that the property of the citizen is not "*entirely*" taken to pay the assessment. The principle stated by this court is logical, that stated by the Court of Appeals is absolutely illogical. It has no foundation, either in reason or in the Constitution, either of Kentucky or of the United States. There is nothing anywhere, in any Constitution, which says that you can take half of the citizen's property for public use without just compensation, but you can not take it all.

After the decision in Norwood vs. Baker came that in French vs. Barber Asphalt Paving Co., 181 U. S. 324, and other cases of similar character decided the same day.

We have read every line, not only of the many opinions delivered by the court in the several cases decided at the same time with French vs. Barber Asphalt Paving Company, but we have read the statements of facts in all of those cases, as given by the court, and we have not been able to find anywhere any retraction of the essential principle expressed in the words heretofore quoted from Norwood vs. Baker ; nor have we been able to find any *condition of facts* presented in any of those cases, so far as is shown by the court's opinions, or its statements of facts, which called for a decision of the question as to whether or not an assessment which is *in fact in substantial excess of the benefits accruing to the property*

must nevertheless be upheld. In all of those cases the attack was simply upon *the legislative act*, or municipal ordinance, under which the proceeding was had. We have not been able to find the statement, in a single one of the cases, that *as a matter of fact* the cost sought to be assessed upon the property involved was in substantial excess of the benefit accruing to it. If any such fact appeared in any record then before the court, that fact is not stated in any statement of fact or opinion of the court then made or delivered; and surely nothing which the court decided was in view of any such consideration. In the first and leading case of the series, to wit, French vs. Barber Asphalt Paving Company, the court, after referring to Norwood vs. Baker and to the principle thereby established, and, without to any extent retracting the same, says:

"It may be conceded that courts of equity are always "open to afford a remedy where there is an attempt, "under the guise of legal proceedings, to deprive a person "of his life, liberty or property without due process of law. "And such, in the opinion of a majority of the judges of "this court, was the nature and effect of the proceedings "in the case of Norwood vs. Baker.

"*But there is no such state of facts in the present case.* "Those facts are thus stated by the court of Missouri:

"'The work done consisted of paving with asphaltum "the roadway of Forest Avenue in Kansas City, thirty-"six feet in width, from Independence Avenue to Twelfth "Street, a distance of one-half a mile. Forest Avenue is "one of the oldest and best improved residence streets in "the city, and all of the lots abutting thereon, front the "street and extend back therefrom uniformly to the depth "of an ordinary city lot to an alley. The lots are all

"improved and used for residence purposes, and all of "the lots are substantially on the grade of the street as "improved, and are similarly situated with respect to the "asphalt pavement. The structure of the pavement along "its entire extent is uniform in distance and quality. "There is no showing that there is any difference in the "value of any of the lots abutting on the improvement.'" (181 U. S. 345.)

This is the statement of facts upon which the case was decided, from which it is seen that there is an entire absence of any showing that the cost of the improvement was in substantial excess of the benefits accruing therefrom. Not a word is said on that subject. But the proposition upon which the property owner there resisted the assessment was, that the act and ordinance under which the assessment was made were unconstitutional, because no provision was made for a hearing upon the question of benefits. He did not insist as a matter of fact that there was no benefit, or that the cost was in excess of the benefit, but he simply said the statute does not provide for a hearing before the assessing tribunal, and therefore the statute is void *in toto* as to all cases.

It will doubtless be contended for defendants in error, as it was contended on the motion to dismiss or affirm, that this court, in the case of Walston vs. Nevin, 128 U. S. 578, upheld the validity of the Statutes of Kentucky governing special assessments. But an examination of the opinion in that case will immediately show that the court's attention, as in the case of French vs. Barber Asphalt Paving Company, was directed entirely to the *validity of the statute.* The question as to whether or not the enforcement of an assessment which was *in fact substantially in excess of the benefit* would be the deprivation of property without due process of law

was neither considered nor decided. The court upheld the statute largely on account of the provision in it heretofore quoted, to the effect that "the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned." But we have already shown that the courts of Kentucky, notwithstanding this provision of the statute, hold that a party is not entitled to show that his property is not benefited by the work for which the assessment is imposed upon it; and the court so held in the case at bar. Whether or not that is a proper construction of the statute, and whether or not the court, under that statute ought, in order "to do justice to all parties concerned," to have allowed defendant to show that its peculiar property was not and could not be benefited to the slightest extent by this improvement, is not now a material question. It matters not to the defendant (plaintiff in error), nor does it make any difference in point of law, whether the fault in taking defendant's property without due process of law lies with a legislature or a court; for the prohibitions of the Fourteenth Amendment to the Federal Constitution against depriving any person of his property without due process of law, are not leveled only against the legislative department of the State, but run against the judicial and executive departments as well. Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226, 233.

Several cases have been decided by this court since French vs. Barber Asphalt Paving Company, and involving this same question, but in none of them has the court ever yet retracted its statement of the fundamental principle of Norwood vs. Baker, as stated in the language quoted above.

We have heretofore referred to the fact that the Oregon case of King vs. Portland, came to this court, where the judgment of the Supreme Court of Oregon was affirmed

(184 U. S. 61); and this court quotes with apparent approval—certainly without any dissent—the following language of the Supreme Court of Oregon, expressing a summary of the law deducible from adjudged cases, to wit:

> "But we are inclined to believe that the better doctrine, "deducible from adjudged cases, including those of the "Supreme Court of the United States, is that *the assess-* "*ment will be upheld whenever it is not patent and obvious*, "from the nature and location of the property involved, "the district prescribed, the condition and character of "the improvement, the cost and relative value of the "property to the assessment, *that the plan or method* "*adopted has resulted in imposing a burden in substantial* "*excess of the benefits*, or disproportionate within the "district as between owners." (184 U. S. 69.)

The manifest inference from this statement is that, where such condition *is* patent and obvious, the assessment will *not* be upheld.

In Voigt vs. Detroit, 184 U. S. 115, the court affirmed the judgment of the Supreme Court of Michigan which upheld the validity of a tax statute of that State, but upon the ground that the statute, as construed by the State court, allowed the property owner to be heard on the question of benefit. This court, referring to the decision of the State court, said:

> "The Supreme Court of the State decided, as we have "seen, 'that the amount of the taxes which may be "assessed upon the district or upon any given parcel of "land can not exceed the benefits.' On the hearing given, "therefore, the property owner can show a violation of "the rule, if a violation there be, and the showing will "take his land out of the district and relieve it from the "tax." (184 U. S. 122.)

In Schaefer vs. Wurling, 188 U. S. 516, this court affirmed the judgment of the Supreme Court of Indiana (156 Ind. 704), which had upheld the validity of the Indiana tax statute in a brief opinion, simply resting the decision upon the authority of Adams vs. City of Shelbyville, 154 Ind. 467, in which case the Supreme Court of Indiana had exhaustively considered and decided the principles upon which special assessments rest, and had then construed the Indiana statute as complying with these principles. The language of the Supreme Court of Indiana in this case of Adams vs. City of Shelbyville, 154 Ind. 467, is very strong, and conforms exactly to what we have heretofore stated as the underlying principle of special assessments. The court says:

"We conclude, therefore, that the principles applicable "to assessment for local improvements are these: The "legislature may create, or authorize a municipality to "create, a local taxing district for local improvement "proposed which includes part only of the property "within the municipality. The legislature may declare "conclusively that only the property within the taxing "district shall be specially assessed on account of local "improvement within that district. *Each parcel of con-* "*tributing property may be assessed only to the extent* "*that it actually receives special benefits.* The taxing "district, as a whole, may be assessed only to the extent "of the sum of the special benefits actually received by "the several parcels of contributing property. The "improvement, so far as its cost exceeds the special "benefits resulting to the several parcels of property in "the taxing district, is a benefit to the municipality at "large, and such excess must be borne by the general "treasury. Property owners affected by an improvement "within a taxing district are entitled to a hearing on the "question of special benefits." (pp. 477, 478.)

In the late case of Lathrop vs. City of Racine, 119 Wis. 461, the Supreme Court of Wisconsin had occasion to review this subject in the light of the decisions by this court both in Norwood vs. Baker and French vs. Barber Asphalt Paving Company, and considered that the fundamental principle of Norwood vs. Baker was not impaired by French vs. Barber Asphalt Paving Company. The court said:

"The Supreme Court of the United States has recently "declared the true rule applicable in a case like this as "follows: 'The principle underlying special assessments "upon private property to meet the cost of public improve- "ments is, that the property upon which they are imposed "is peculiarly benefited, and therefore that the owners do "not in fact pay anything in excess of what they receive "by reason of such improvement. The exaction from "the owner of private property of the cost of a public "improvement in substantial excess of the special benefits "accruing to him, is to the extent of such excess, a taking, "under the guise of taxation, of private property for pub- "lic use without compensation.' Norwood vs. Baker, 172 "U. S. 269. That was a case in equity, the same as this. "The case was considered in the latter case of French vs. "Barber Asphalt Paving Company, 181 U. S. 324, in "which the court divided, but the majority of the court "as well as the minority reaffirmed the decision in Nor- "wood vs. Baker, *supra*." (p. 475.)

In the case of White vs. City of Tacoma, 109 Fed. Rep. 32, the court had occasion to consider expressly the question of the combined effect of Norwood vs. Baker and French vs. Barber Asphalt Paving Company, and said:

"In a series of decisions recently rendered the Supreme "Court of the United States has corrected a common

"misunderstanding of the decision of that court in the case "of Village of Norwood vs. Baker, 172 U. S. 269. (Citing "the cases referred to.) In these several decisions the "Supreme Court recognizes the fact that the per front "foot plan *may be* a perfectly fair method of apportioning "the burden of paying for street improvements, and that "in cases in which it appears that assessments levied "according to that plan are not in excess of the benefits "to the property assessed, and are equal and fair, *so that* "*there is no ground for complaining of actual injustice*, "the assessments are not *necessarily* in violation of the "Constitution of the United States *merely because made* "*according to the per front foot plan;* and it is shown "that no such inflexible rule was announced or intended "by the court in its decision in the case of Village of "Norwood vs. Baker. That decision, however, does "emphatically declare these important principles: That "State laws providing for assessing the cost of street "improvements upon abutting property, which *in prac-* "*tical operation do confiscate property*, are obnoxious to "the Fourteenth Amendment to the Constitution of the "United States, and for that reason it is the duty of the "courts to declare them to be void. That special assess- "ments to pay for local improvements of public streets "and highways, *do, in practical effect, deprive owners of* "*their property without due process of law, unless the* "*property subject to assessments is benefited by the* "*improvements correspondingly to the amount of the assess-* "*ment.* That owners of property have the right to appeal "to the courts for judicial protection against the uncon- "stitutional invasion of their rights by municipal govern- "ments in enforcing State laws or local regulations for "the collection of assessments *which are in excess of the*

"*benefits to the property assessed*, accruing or to accrue "by reason of the improvements to be paid for by such "assessments. *These principles remain unaffected by the* "*recent decisions of the Supreme Court.*" (pp. 33, 34.)

And speaking of this opinion, the editor of the Central Law Journal says:

"Without hesitation we pronounce this decision not "only eminently just and equitable, but also among the "foremost of the decisions of this question by reason of "its clear recognition and elucidation of right principle "and sound law." (53 Central Law Journal, 281.)

After the enunciation by this court of the principle involved in Norwood vs. Baker, it was received by the Supreme Courts of many of the States with, we might almost say, enthusiastic approval, as being manifestly and eminently just.

In Sears vs. Board of Aldermen of Boston, 173 Mass. 71, the Supreme Court of Massachusetts said:

"It is now established by the highest judicial authority "that such assessments (special assessments) can not be "so laid upon any estate as to be in substantial excess of "the benefit received. The case of Norwood vs. Baker, "172 U. S. 269, contains an elaborate discussion of the "subject, with a citation of authorities from many of the "States, and holds that a local assessment for an amount "in substantial excess of the benefit received is in violation "of the Fourteenth Amendment of the Constitution of "the United States, inasmuch as it would deprive one of "his property without compensation, and so without due "process of law. The authority of this case is controlling

"in all State courts, and *if it were not*, it is *in accordance* "*with sound principle*, and with the great weight of "authority in other courts." (p. 78.)

In Hutchison vs. Storrie, 92 Texas, 685, the Supreme Court of Texas, after stating the principle decided in Norwood vs. Baker, says:

"We recognize the binding force of the decisions of "the Supreme Court of the United States upon this ques- "tion, but *we the more readily apply it, because we endorse* "*it as a timely and just announcement of the superiority* "*of a constitutional guaranty over a rule of law established* "*by the courts.*" (p. 691.)

The Supreme Court of Ohio in Schroder vs. Overman, 61 Ohio St. 1, 47 L. R. A. 156, fully recognized the effect and the justice of the principle settled by Norwood vs. Baker, but pointed out that in that case the court had determined, upon the trial, that the benefit in fact exceeded the amount of the assessment; and in that connection said:

"Undoubtedly, as has been held by this court again and "again, the principle which permits the assessments of "the cost of local improvements upon abutting and con- "tiguous lands is that such property receives benefits "beyond that common to the public at large, and the *con-* "*clusion would naturally follow*, and does follow, that *such* "*assessment can in no case, save by express consent of* "*the owner, lawfully exceed such benefit.* It follows, "further, that any system which results in imposing such "assessments without respect to benefits must be vicious "and unsound. But we are dealing with a case where the "court has determined upon a trial that the benefit *in* "*fact* exceeds the amount of the assessment, and yet where

"the plaintiff asks the interposition of a court of equity to "prevent the commission of an alleged wrong upon her "property." (p. 13.)

In Kersten vs. City of Milwaukee, 106 Wis. 200; 48 L. R. A. 851, a Board of Public Works claimed to have viewed the premises, and to have based an assessment upon their judgment of cost and benefit; but the court disregarded the same upon the proof in the case to the effect that the conclusion of the board was *palpably not justified by the facts*, and on that subject the court said:

"It is not enough for the board to say that they viewed "the premises, and exercised their judgment, if the facts "negative that assertion. Here *the facts cry out so loudly* "*against the conclusion reached that we find no difficulty* "*in agreeing with the court's estimate of the board's pro-* "*cedure.*" (p. 204.)

Accordingly the court held that all proceedings should be stayed until there should be a reassessment of damages and benefits.

In the late case of Smith vs. Worcester, 182 Mass. 232, decided after the decisions in both Norwood vs. Baker and French vs. Barber Asphalt Paving Co., the Supreme Court of Massachusetts, speaking through Chief Justice Holmes, said:

"Under the recent decisions it may be true that when "the legislature is passing a *law of general future appli-* "*cation*, and when, therefore, it can not be supposed to "have compared the local benefit with the cost, the only "mode in which it can be made certain, apart from the "police power, that *constitutional rights* are preserved is by "limiting each assessment upon an estate to the benefit "received by that estate. But when the legislature has

"contemplated *a certain region*, and may be supposed to "have acted in view of a *specific scheme*, there is no doubt "that within reasonable limits it may determine that the "cost of improvement shall fall upon a *designated district*, "and may fix the principles upon which the cost shall be "apportioned." (p. 234; our italics.)

We think we may appropriately conclude our reference to authorities on this general subject by another quotation from the language of Judge Dillon in his work on Municipal Corporations, in which, in speaking of this subject and the conflict in authority, he says:

"Whether it is competent for the legislature to declare "that no part of the expense of a local improvement of a "public nature shall be borne by a general tax, and that "the whole of it shall be assessed upon the abutting prop- "erty and other property in the vicinity of the improve- "ments, thus for itself conclusively determining, not only "that such property is specially benefited, but that it is "thus benefited to the extent of the cost of the improve- "ment, and then to provide for the apportionment of the "amount by an estimate to be made by designated boards "or officers, or by frontage or superficial area, is a question "upon which the courts are not agreed. Almost all of "the earlier cases asserted that the legislative discretion "in the apportionment of public burdens extended thus "far, and such legislation is still upheld in most of the "States. But since the period when express provisions "have been made in many of the State Constitutions "requiring uniformity and equality of taxation, several "courts of great respectability, either by force of this "requirement or in the spirit of it, and perceiving that "special benefits actually received by each parcel of con-

"tributing property *was the only principle upon which* "*such assessments can justly rest*, and that any other rule "is unequal, oppressive and arbitrary, have denied the "unlimited scope of legislative discretion and power, and "asserted *what must, upon principle, be regarded as the* "*just and reasonable doctrine, that the cost of a local* "*improvement can be assessed upon particular property* "*only to the extent that it is specially and peculiarly bene-* "*fited; and, since the excess beyond that is a benefit to the* "*municipality at large, it must be borne by the general* "*treasury.*" (2 Dillon on Municipal Corporations, 4th edition, page 935, Section 761.)

Whatever may be the result of the application of the principle to a particular case, it does seem to us that the authorities cited establish *the principle* that the *only constitutional basis* for taxation in the form of *special assessments* upon selected property is *special benefit* to that property, accruing from the work for which the assessment is made.

Before considering the general subject of relief against the violation of this principle, as applicable to property in general, we desire to call the court's attention to specific adjudications which have been made by courts of high character upon the subject of its application to the peculiar kind of property involved in the case at bar, to wit, *railroad rights of way.*

II.

Special Assessments Against Railroad Rights of Way.

Whatever may be the true rule as to property in general, the property involved in the case at bar is peculiar; it belongs to a class by itself; it is a *railroad right of way*. It is one kind of property which certainly is not benefited, and can not be benefited, by the improvement of a highway running either across it or parallel to it. The question is not as to whether the railroad *company* which owns this section of a right of way is benefited by the construction or improvement of streets running into or through the city; for all the inhabitants of the city, all persons who do business in the city, the railroad company included, are benefited by anything which benefits the city, and increases its commerce. But while such general benefits justify general taxation, they do not justify special taxation, assessed upon specific pieces of property, selected out of the great bulk of the property in the city. The benefits which justify special assessments, for the purpose of paying for local improvements, must be benefits special or peculiar to *the property which is specially taxed*. Therefore we say that, while the construction or improvement of a highway which runs across or parallel with a portion of a railroad right of way may benefit the railroad *company*, just as it benefits all other inhabitants of the city, yet it does not benefit that *particular section of the right of way*, which happens to be near the street thus improved.

We are not now considering the question of whether the construction or improvement of the street benefits property upon which the company's *depot* may be situated, or property occupied by its *yards*, but we are considering alone the question of benefit to a mere section of its *right of way*,

which is occupied solely by a portion of the roadbed of its main road, and the tracks thereon. And the peculiar nature of this property, and the peculiar use made of it, make it so absolutely plain that no benefit thereto can come from the improvement of an adjacent highway, over which persons travel in carriages or on foot, as to make the proposition indisputable, and one which a court, or the judge thereof, as a man of common knowledge and experience, must know to be true, even in the absence of allegation or proof.

In the case at bar it is alleged, and not denied, that on this narrow right of way, which is only 66 feet wide, the portion thereof involved in this case being nearly 1,800 feet long, there are no houses or buildings of any kind; that there is a double track railroad upon it; and, in the language of the answer, "it is used only, and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its roadbed, as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid." (R. 16.) And the great weight of modern authority, even before the case of Norwood vs. Baker was decided, was and is to the effect that property of this kind can not be assessed with any part of the cost of improving a street, *because it is one class of property concerning which it is not possible to indulge the presumption that it is benefited by such an improvement.*

One of the strongest cases on this subject is Allegheny City vs. West Pennsylvania Railroad Co., 138 Pa. St. 375. This is a peculiarly strong case, because the general rule in Pennsylvania, as recognized in that case, is that the owner of an ordinary piece of property can not defend against a local assessment on the idea that his property is not benefited. The opinion in this case is so strong and so directly applicable to the case at bar, and has been so often cited and quoted

since, that we feel justified in making quite an extensive quotation from the language of the court. It says:

"The constitutionality of assessments for street improvements can be sustained only upon the ground that the "property assessed is benefited by the improvement. This "is the doctrine of all the authorities. It is sufficient to "refer to Hammett vs. City of Philadelphia, 65 Pa. St. 150.

"It is true, as a general rule, the property owner can "not defend that his property is not benefited by the "improvement. Michener vs. City of Philadelphia, 118 "Pa. St. 535; Commonwealth vs. Woods, 44 Pa. St. 113. "These cases, however, and the reasoning by which they "are supported, have no application to the roadbed of a "railroad company. *This is the one species of property "which, it is conceded, can derive no possible benefit from "street improvements.* As was said in Philadelphia vs. "Railroad Company, *supra* (88 Pa. St. 424), 'a railroad can "not, from its very nature, derive any benefit from the "paving, while all the rest of the neighborhood *may.*' "The owner of an ordinary lot of ground, whether such "owner be an individual or a railroad corporation, can "not be heard to defend against a municipal assessment "for paving, for the reason that the *law presumes* such "property is benefited. But, in the case of the roadbed "of a railroad, the presumption of law is the other way. "It is the same at all times and under all circumstances; "herein *the law declares the absence of benefits.*

"It was urged, however, that the liability of a railroad "company for municipal assessments was decided by this "court in Western Pennsylvania R. Co. vs. Allegheny, 2 "W. N. 229. That case does not rule this, however. A "railroad company may be liable for some municipal

"assessments. We have just decided in Mt. Pleasant Bor. "vs. Railroad Co. (138 Pa. St. 365), as has been already "stated, that a passenger depot, freight depot, and lumber "yard were so liable. But neither of the above cases "nor any other case to which my attention has been called "has ever held that such a lien may be filed against the "roadbed. It was urged, however, that it is *within the "power* of the legislature to subject it to such claims, and "that the act of 1870 has done so in the city of Alle- "gheny. We are not discussing the power of that body "to impose *general taxation.* It is admittedly very great, "and, as observed in Fox's Appeal, 112 Pa. St. 337, "'within the limits of the Constitution it is bounded only "by the necessities of the State and the will of the peo- "ple.' We are dealing with the case of *special, local* tax- "ation; of the right of municipal authorities to levy a "tax upon A, which it does not impose upon B, for the "reason that it has done something by which the property "of A has been specially benefited to the amount of the "tax. In the absence of any such benefit, in a case "where we can declare as a matter of law no such benefit "can arise, the legislature is powerless to impose such a "burden. It would not be a tax in any proper sense of "the term: it would be in the nature of a forced loan, "and *would practically amount to confiscation.*" (pp. 382, 383.)

The same conclusion was reached by the Supreme Court of Wisconsin in Chicago, M. & St. P. R. Co. vs. Milwaukee, 89 Wis. 506. Here the court follows the reasoning and cites a number of the decisions of the Supreme Court of Pennsylvania, including the one just quoted from, and, among other things, says:

"It is universally conceded that all such assessments

"(special assessments) have their foundation, rest upon, "and can not lawfully exceed, the special benefits of the "improvement to the property against which the cost of "its construction to that extent is charged. (Citing author- "ity.) Such an assessment can not be maintained for "general benefits to the community or locality resulting "from the work. For the payment of such expenditures "resort must be had to *general* taxation, the rule of which "is required to be uniform. * * * We think it "clear, *as a matter of law*, that property such as the rail- "road tracks and necessary right of way can not be said "to be benefited by the improvement in question. "* * * In Junction R. Co. vs. Philadelphia, 88 "Pa. St. 424, it was held that the city could not maintain "a municipal claim for paving against or opposite the "roadbed of a railroad company, and that it was *immate- "rial whether the company had simply a right of way or "owned the bed in fee.* * * *

"It was contended that the assessment of the Board "of Public Works is conclusive that the entire strip in "question, *including the track and necessary right of way*, "was benefited by grading and paving of Commerce "Street; and that the only question open to the appellant "was as to the amount of benefits. (Citing the cases "relied on.) The question of benefits to the track and "right of way being a legal one, manifestly the assess- "ment can not be conclusive, but the position is no doubt "correct as to the rest of the strip. This precise question "was presented in Allegheny City vs. West. Pennsylvania "Railroad Co., 138 Pa. State, 382, where it was held that," etc. (Quoting part of the language hereinbefore quoted in this brief.) (pp. 515, 516, 517.)

In Detroit, etc., R. Co. vs. City of Grand Rapids, 106 Mich. 13, which involved a local assessment upon the railroad right of way, the court said:

"The right of way so assessed contains the main track "and one sidetrack. It has nothing else upon it, and is "used for no other purpose. It has already been dedi- "cated to a public use, and the question is presented "whether a railroad right of way can be assessed by "municipal corporations for public improvements. So "far from being any benefit, it is established by the evi- "dence that the opening and paving of the street were a "damage to the complainant. *A right of way can not be "benefited by the opening and paving of a street upon it.* "None of the buildings of the complainant are within "two blocks of this crossing. We can see no benefits, "immediate or prospective, to the complainant. The "division of the right of way into three parcels was "*arbitrary, as were also the valuations and supposed ben- "efits.* The point is so clearly and concisely stated by "the Supreme Court of Pennsylvania that we quote the "opinion in City of Philadelphia vs. Railroad Co., 33 Pa. "St. 43." (Here quoting.)

In New Jersey R. R. Co. vs. City of Elizabeth, 37 N. J. Law, 330, there were involved two assessments against a railroad right of way, one for improving a street which crossed it, and the other for improving a sewer near it. The court held that there was no benefit from either improvement, and hence that the assessments could not be upheld. On the subject of the street improvement it said:

"Nor can this assessment be supported on the other "ground of benefits conferred in the advantage derived

"in the improvement of the company's lands for the uses "to which they are appropriated. The proof is that the "paving laid on the crossing of the street over the rail- "road track is an injury, rather than a benefit, to the "company, and occasions increased expenses in keeping "the track in repair. The case in this respect is within "the decision of this court in State, the M. & E. R. R. "Co. Pros. vs. Jersey City, 7 Vroom. 56; and the assess- "ments for paving must be set aside." (p. 333.)

Then, as to the sewer assessment, the court said:

"There is nothing in the purpose for which the com- "pany was incorporated, or the use to which the land was "appropriated, that will invalidate the assessment; it "must, therefore, be affirmed, unless its imposition, in this "case is a violation of the principles laid down in the "Tidewater case (3 C. E. Green, 519), that an assessment "of an individual owner towards defraying the cost of a "local improvement, must be founded on some peculiar "benefit derived by him from its construction over and "above that of the public, and that the amount which he "may lawfully be required to contribute to that end is "limited to the *quantum* of benefit he receives." (p. 333.)

The opinion of the Supreme Court of Iowa in Chicago, etc., R'y Co. vs. Ottumwa, 112 Iowa, 300, is quite pertinent to the present consideration, though possibly it can not be cited as an absolute adjudication of the question, for the case was really decided upon a question of construction of the statute, although, as will be seen from the opinion, this construction was induced mainly by the consideration that a *railroad right of way is not benefited* by the paving of a street, and therefore could not be assumed to have been

within the legislative intent in providing for local assessment to pay for the cost of such improvement. The court says:

"We may well assume that the legislature, in passing "the acts in question, did not intend that railway rights of "way should be assessed for paving and curbing, for the "reason that such rights, used solely for the laying of "tracks, would not, as a general rule, be benefited in any "manner whatever by the paving or curbing, and if any "argument were needed to enforce this thought, it is to be "found in the facts of this case, which show that it was "of no benefit whatever to the right of way. A different "question arises where the property is used for depot "grounds and other like purposes. On that point we "express no opinion, for it does not arise in the instant "case. (p. 310.) * * *

"Again, it is said that no benefits resulted to the right "of way, or to the corporation owning or occupying the "same, and that for this reason the assessment was *invalid.* "If that were the only question in the case, *we would be* "*inclined to hold with appellant's contention that, as there* "*was no benefit whatsoever, the assessment was, for that* "*reason alone, invalid.* There are, of course, some objec- "tions to this conclusion, and it is best perhaps that we "express no decided conviction on the subject, for it seems "to be held by courts of high authority that the legis- "lature has power to authorize the assessment of railway "rights of way for local improvements. *In re* County "Commissioner of Hampshire County, 143 Mass. 424. "That question is also left open for further consideration "when it properly arises." (p. 313.)

An examination of the Massachusetts case here referred to by the Supreme Court of Iowa shows that the improve-

ment involved in the Massachusetts case was not a street improvement, but was the improvement of a bank of the Connecticut River near which ran the right of way of the railroad, so that the protection of the bank of the river operated as a protection, and consequent benefit, to the railroad right of way. In fact that does not seem to have been disputed in the case, and there was no question of constitutional power involved in it.

On the question of fact as to whether or not railroad property is benefited by the improvement of a street near it, the Supreme Court of Connecticut seems to have gone to an extreme length in the case of New York, etc., R. Co. vs. City of New Haven, 42 Conn. 279, in which it was held that there is no special benefit even to the *depot property* of a railroad company by the improvement of a street approaching the same. But it is not necessary for the purposes of the present case that the correctness of this conclusion should be determined.

Now, as against this array of authorities, most of which are quite modern, counsel for the defendant in error rely upon two cases, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, and Peru, etc., R. Co. vs. Hanna, 68 Ind. 567.

In the first of these two cases, to wit, Northern Indiana R. Co. vs. Connelly, 10 Ohio State, 159, in dealing with this question of the right to assess a railroad right of way for the improvement of a street, the court says:

"But it is said that assessments, as distinguished from "general taxation, rest solely upon the idea of equivalents, "a compensation proportioned to the special benefits "derived from the improvements, and that in the case at "bar the railroad company is not, and in the nature of "things can not be, in any degree benefited by the

"improvement. It is quite true that the right to impose "such special taxes is based upon a *presumed* equivalent; "but it by no means follows that there must be *in fact* "such full equivalent in every instance, or that its "absence will render the assessment invalid. * * * "*The mode adopted by the council becomes the statutory* "*equivalent for the benefits conferred, although in fact the* "*burthen imposed may greatly preponderate.* In such "cases, if no fraud intervene, and the assessment does not "substantially exhaust the owner's interest in the land, "his remedy would seem to be to procure, by a timely "appeal to the city authorities, a reduction of the special "assessment and its imposition, in whole or in part, upon "the public at large." (p. 165.)

As to the last suggestion, that a party's remedy is to appeal to the city authorities to reduce his assessment and impose the burden upon the public at large, this can not apply to an assessment made under the law of Kentucky, for no such appeal would be, or could be, heard under the Kentucky law. The council has no discretion in the matter.

The language of the Supreme Court of Ohio in the case just quoted seems to us to be in effect the language of absolutism. To the citizen who insists that his property can not be taken without compensation, and that the particular improvement in question is of no benefit to him, and therefore no compensation for the burden imposed, and that there is no reason why his property should be singled out from the mass of property in the city and required to pay the cost of this public improvement, and that the Constitution gives him a right to an equivalent for his property taken, the court says: "Yes, you are right about this; you are entitled to compensation; the legislature can not take your property, even for

public use, without an equivalent to you, the Constitution so provides; *BUT* that is a mere *fiction* of the law; although *in fact* you received no equivalent, yet the law conclusively *presumes* you have received it, because the legislature and council have ordered your property to be taken; and '*the mode adopted by the council becomes the statutory equivalent for the benefits conferred.*' " This process of reasoning seems to us to make the claim of constitutional limitation upon the power of the legislature, and of constitutional protection to the rights of private property, a subject of ridicule. The most absolute despot that ever lived might, with equal force and truth, boast that his is a constitutional monarchy, while saying to a subject: "I want your house and lands, you are entitled to be paid for them; an order has been issued that you deliver them to me; that order is the 'equivalent' for your property. You are *presumed* to have been compensated."

In the other case relied on, to wit, Peru, etc., R. Co. vs. Hanna, 68 Ind. 567, the court, without attempting to reason upon the subject, disposes of it in the following two short sentences, to wit:

> "The first point made by appellant's counsel is that the "strip of ground in controversy is not assessable for street "improvement, because the railroad track is itself a public "highway. We can not concur in this view, but are of "opinion that the track of a railroad company, when it "borders on a street, is properly assessable for its due pro- "portion of the cost of the improvement of such street "under an ordinance of the city. City of Chicago vs. "Baer, 41 Ill. 306; Northern Indiana R. R. Co. vs. Con- "nelly, 10 Ohio St. 159; Burlington, etc., R. Co. vs. "Spearman, 12 Iowa, 112." (p. 567.)

Now, of the three authorities thus cited by the Supreme Court of Indiana in support of this proposition, two of them, to wit, the cases in 41 Illinois and 12 Iowa, have absolutely no application to the question under consideration, because in each of them it was conceded that the property in question *was benefited* by the improvement made. In the Iowa case the property was a railroad *depot;* and while the Supreme Court of Iowa held that this was assessable, we know from the authority heretofore cited that, as to a railroad *right of way*, the Supreme Court of Iowa holds that it is not benefited by a street improvement, and is not assessable. (Chicago, etc., R. Co. vs. City of Ottumwa, 112 Iowa, 300, 309.) And in the Illinois case, City of Chicago vs. Baer, 41 Ill. 306, the property involved was a street railway, in the street improved, and the court in its opinion expressly says that no one denies that the property is in fact benefited, that the fact of actual benefit to the property is something which *no one would controvert.* The only other authority cited by the Indiana court for its very brief statement on the subject is the case, just considered, of Northern Indiana R. Co. vs. Connelly, 10 Ohio St. 159.

We find that a decision by this court, to wit, Illinois Central Railroad Co. vs. City of Decatur, 147 U. S. 190, is sometimes cited as a decision to the effect that a railroad right of way is benefited by the improvement of a street, and that to assess the right of way with that part of the cost of such improvement does not deprive the company of its property without due process of law. As a matter of fact, however, no such question was involved in that case. The case was one which arose in a State court in Illinois and came to this court by writ of error to the Supreme Court of Illinois. Of course, it came here only on a *Federal question*, and only upon such Federal question as was *raised by the record.* And

the only Federal question raised by the record was a question of *contract*. The railroad company in its charter had a provision to the effect that, upon the payment of certain taxes, it should be exempt from *all other taxation;* and it was insisted that this exemption covered *special assessments* for local improvements, as being a form of taxation; and therefore, that the attempt to tax the property of the railroad company for a street improvement was a *violation of the charter contract*. The railroad company did not make the question that to tax the property for a local improvement, when there was no local benefit, was a deprivation of property *without due process of law*. That the question in the case was the one we have stated, to wit, the question of contract, and not a question of due process of law, is shown by the opening sentence in Mr. Justice Brewer's opinion, which is as follows, to wit:

> "*The single question in this case is*, whether this special "tax for the local improvement *is within the exemption* "*from taxation granted to the railroad company by Sec-* "*tion 22 of the act of 1851*." (p. 197.)

The court then proceeds to examine into the question of the nature of general taxation and special taxation, and to show that, while a special tax is, in its proper sense, *a tax*, yet it was manifestly not the character of tax that was referred to by the terms used in the charter contract, and therefore that there was no violation of that contract. And when the court, in the last paragraph of its opinion (p. 208), uses language to the effect that the company did not, by its charter, have any contract as to whether the question of local benefits should be determined by a *jury* or by a *council*, it was still considering the question of the *construction of that charter contract*, and was referring to the fact, which is a fact in Illi-

nois judicial history (as shown by the opinion of the court in White vs. the People, 94 Ill. 504), that there had grown up in the State of Illinois two different procedures for paying the cost of local improvements, to wit, one called generally a "special tax," and the other a "special assessment," in one of which *the council* passed on the question of benefits, and in the other of which a *jury* passed on the question. And all the court meant by the language of the last paragraph of the opinion is that the railroad company had no *contract* with the State of Illinois as to how the question of special benefits should be determined. The question involved in the case at bar as to the power to impose a special tax upon property for a local improvement, based on the pretense of local benefit, when there had, in fact, been no local benefit, was not involved in that case, as the opening sentence of the opinion above quoted shows.

The court may find a number of *street railway* cases cited, in which it has been held that a street railway *lying in the street improved* may be assessed for an improvement of the street. But it is manifest that an improvement of the street in which the street railway lies is a benefit to the street railway; and in the cases upon that subject this consideration is brought forth. Thus City of New Haven vs. Fair Haven R. Co., 38 Conn. 422, is sometimes cited; but that was a case of a *street railway*, and the court said, as a matter of fact, that the defendant was *unquestionably benefited* by the improvement. Again, the case of the Appeal of North Beach R'y Co., 32 Cal. 499, is sometimes cited. This also was a street railway; and the court held as a *conclusion of fact* that there could be no doubt that the property of the street railway company was benefited by the widening and improvement of the street involved. On that subject it said: "The more people traveling and frequenting Kearney Street,

the greater the number likely to ride in the company's cars, and the greater its profits are likely to be." (32 Cal. 514.) Manifestly, these street railway cases have no bearing whatever upon the question involved in the case at bar.

It seems to us it must be evident to any thinking person, and would be evident in the absence of allegation or proof, that a *mere section of the right of way of a railroad*, whether the title be technically an easement or a fee, upon which are only the roadbed and the tracks of the company, is *not benefited to the slightest degree by the opening or the paving of a street, crossing the same or running parallel with it;* but that, on the contrary, as alleged in the answer in the case at bar, the improvement of such a street, or anything which induces additional passage over it, running across the railroad or immediately adjacent to it, is an injury rather than a benefit. And it seems to us to be simply a mockery to say that, while this is true, yet the court will *presume the contrary to be true*, in order to meet the constitutional requirement that the property of the citizen shall not be taken, even for a public purpose, without just compensation.

III.

Relief Against Unconstitutional Acts.

If it be true, as we think we have shown is the case, that the only constitutional basis for taxation in the form of special assessments upon selected property is special benefits to that property, resulting from the work for which the assessment is made; in other words, if it is contrary to the Constitution to impose upon particular property a special assessment for the doing of a work from which that property receives no benefit, and if, nevertheless, the legislature of a State enacts a statute under which this very thing is directed to be

done, can the courts of the country give no relief against this violation of the Constitution? We do not refer to the case where either the legislature of the State or a municipal council, acting under authority of a legislative act, has had in contemplation a particular situation, and has determined in view of the facts how a certain improvement shall be made, and what property has been or will be benefited thereby. We refer to a case where the legislature of the State, looking to all future time, and without having in mind any particular situation, simply passes a general law and prescribes that in the future the cost of making all streets in all cities of the first class in the State shall be assessed upon all the property lying between that street and a line drawn halfway between it and the next parallel street on each side thereof, without regard to what the situation in any particular case may be, and even though it may be apparent that some property thus included receives not the slightest benefit from the making of the street, as is true in the case at bar. The contention that the legislature is thus omnipotent, and that there is no power to relieve the citizen against this manifest violation of a constitutional right, seems to us to recall the language of this court speaking through Chief Justice Marshall in Marbury vs. Madison, 1 Cranch, 176, as follows, to wit:

"The question, whether an act repugnant to the Con-
"stitution can become the law of the land, is a question
"deeply interesting to the United States; but, happily,
"not of an intricacy proportioned to its interest. It
"seems only necessary to recognize certain principles,
"supposed to have been long and well established, to
"decide it.

"That the people have an original right to establish,
"for their future government, such principles as, in their

"opinion, shall most conduce to their own happiness, is "the basis on which the whole American fabric has been "erected. The exercise of this original right is a very "great exertion; nor can it, nor ought it, to be frequently "repeated. The principles, therefore, so established, are "deemed fundamental. And as the authority from which "they proceed is supreme, and can seldom act, they are "designed to be permanent.

"This original and supreme will organizes the govern- "ment, and assigns to different departments their respect- "ive powers. It may either stop here, or establish *certain* "*limits not to be transcended by those departments.*

"The government of the United States is of the latter "description. The powers of the legislature are defined "and limited; and that those limits may not be mistaken, "or forgotten, the Constitution is written. *To what pur-* "*pose are powers limited, and to what purpose is that lim-* "*itation committed to writing, if these limits may, at any* "*time, be passed by those intended to be restrained?* The "distinction between a government with limited and "unlimited powers is abolished if those limits do not "confine the persons on whom they are imposed, and if "acts prohibited and acts allowed are of equal obligation. "It is a proposition too plain to be contested that the "Constitution controls any legislative act repugnant to it; "or, that the legislature may alter the Constitution by an "ordinary act.

"Between these alternatives there is no middle ground. "The Constitution is either a superior paramount law, "unchangeable by ordinary means, or it is on a level "with ordinary legislative acts, and, like other acts, is "alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a

"legislative act contrary to the Constitution is not law; "if the latter part be true, then written Constitutions are "absurd attempts, on the part of the people, to limit a "power in its own nature illimitable.

"Certainly all those who have framed written Constitu- "tions contemplate them as forming the fundamental and "paramount law of the nation, and, consequently, the "theory of every such government must be that an act of "the legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Con- "stitution, and is consequently to be considered, by this "court as one of the fundamental principles of our society. "It is not, therefore, to be lost sight of in the further con- "sideration of this subject."

Of what possible benefit is it to the citizen that the Constitution provides that he shall not be deprived of his property without due process of law, that his property shall not be taken from him, even for a public purpose, without just compensation, if the legislature has nevertheless the absolute power to say that his property shall be taken from him, even though he has received no compensation? Yet that power is what is contended for, and must be upheld, if the judgment in this case is affirmed.

We do not contend that a statute of the character in question is void *in toto*, and as to *all property*. All we contend for is that, if this particular property is, in fact, not benefited by the making of this street, then to take that property, or to take $3,176.72 worth of it, to pay for the making of that street, is to take, to that extent, the property of its owner for public use without any compensation. It may be that the true rule is that which the Supreme Court of Oregon, in King vs. Portland, quoted afterwards by this court, said was deducible from the adjudged cases, viz., that the assessment

will be upheld wherever it is not patent and obvious from the entire situation that "the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits." (184 U. S. 69.) All we contend for is that the owner of this property must be permitted to show, if he can, that this general rule, adopted long years before the particular work in question was done, and without any special reference to that particular work, when applied to this particular case, "has resulted in imposing a burden in substantial excess of the benefits." That it does thus result is conceded in the case at bar; and the defendant in error contends for the bald proposition that there is no help for it.

It will not do to say that the legislature *has determined* as a matter of fact that the right of way of the Louisville & Nashville Railroad Company adjacent to Frankfort Avenue *has been benefited* to the extent of the amount of this assessment, to wit, $3,176.72. That is simply *not true;* and this court knows, on the face of this record and on the face of the statutes and ordinances involved, that it is not true. *There has been no such determination by the legislature, or by any other tribunal.* There has been no consideration of that question by any tribunal whatever. As we have heretofore shown, the legislative act involved is simply a *general rule applicable to all cases that may arise in the future, without any reference to the particular facts of any situation, or to the peculiar character or nature or value of any particular property or public improvement.* It is *a law, a rule,* as distinguished from *a decision.* And the apportionment involved in the case at bar against this right of way of the Louisville & Nashville Railroad Company is simply the result of the application of that law which the legislature, years before this improvement was ever undertaken, declared should be applied *to all cases, without regard to the individual facts of any case.*

It is true, as we have heretofore mentioned, that the statute contains a provision that the court in which any suit may be pending "shall make all corrections, rules and orders to do justice to all parties concerned"; yet, as heretofore explained, the courts of Kentucky have construed this as not permitting any person whose property is thus assessed to show that the cost assessed against his property is in substantial excess of the benefit accruing thereto, unless he can show that the cost thus assessed is absolutely equal to the value of his property, so as to "entirely" take from the citizen his property. The courts of Kentucky have construed this provision as to corrections as simply giving the power to make, for example, such a correction as was made in the case at bar, when the court determined that the territory contiguous to the improvement was defined into squares, within the meaning of the law, and therefore that the assessment should extend halfway back to the next parallel street, instead of being limited to a depth of 195 feet, as prescribed by the ordinance under which the work was done.

We repeat that there has never been any determination by any tribunal, legislative or judicial, that the property here involved is benefited, or will be benefited, by the public work for which the cost of $3,176.72 is assessed against this property. That the property is not benefited by the improvement in question is admitted, and must be patent to any one. The property of the citizen is about to be taken from him for public use without any compensation whatever, simply because the legislature of the State in a general law, prescribing a rule for all future cases, has declared that it shall be done. And in conclusion we may ask, in the language of Chief Justice Marshall:

"To what purpose are powers limited, and to what pur-
"pose is that limitation committed to writing, if these

"limits may, at any time, be passed by those intended to "be restrained?"

We respectfully ask that the judgment of the Court of Appeals of Kentucky be reversed and the cause remanded with directions to dismiss the proceeding as against the right of way of the Louisville & Nashville Railroad Company.

Respecfully submitted,

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February 2, 1905.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows. The sections quoted are portions of an act of the Kentucky legislature entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed Kentucky Statutes:

PUBLIC WAYS.

Section 2832. *Public Ways, Improvements, Meaning of Terms.* Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. *Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien.* When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the *exclusive cost* of the owners of lots in each fourth of a square to be *equally* apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets,

the ordinance providing for the improvement of such public ways shall state the *depth* on both sides fronting said improvement to be assessed for the cost of making the same, *according to the number of square feet* owned by the parties respectively, within the depth, as set out in the ordinance. The General Council shall have power by ordinance, recommended by the Board of Public Works, to cause the digging and the walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square for the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the General Council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the Board of Public Works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid. (*Section as amended by Act of March 19, 1898, making radical changes in old section.*)

Section 2834. *Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance.* A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the General Council shall exempt from

payment after the work has been done as required by either the ordinance or contract; but the General Council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the General Council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the General Council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. *Sidewalks and Curbing—Apportionment of Cost.* The cost of making sidewalks, including curbing, whether by original construction, or reconstruction, shall be apportioned to the front foot, as owned by the parties, respectively fronting said improvement except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. *Property Owners Permitted to Improve Public Ways.* The Board of Public Works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the Board of Public Works.

Section 2837. *Inspection and Reception of Work—Publication of Notice.* When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the Board of Public Works shall, by one insertion in one of the daily newspapers published

in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents and representatives may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. *Action to Enforce Lien—Evidence—Provision for Redemption.* In all actions to enforce liens, a copy of the ordinance authorizing the improvement or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be *prima facie* evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be *prima facie* evidence of every other fact necessary to be established by the plaintiff in such actions, to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent. per annum, and all the taxes and assessments on and against such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments, and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. *Apportionment Warrants—Registration—Lien.* The Board of Public Works shall make out all appor-

tionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphabetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the Board of Public Works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.